

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The parties have stipulated that claimant met with personal injury by accident arising out of and in the course of his employment with respondent on August 22, 1991. This injury to claimant's low back resulted in a bi-level fusion at L4-5 and L5-S1 with the surgery performed by Dr. Neonilo Tezano. Dr. Tezano opined claimant had a 25 percent functional impairment to the body as a whole and placed certain specific restrictions upon claimant which prohibited claimant from repetitive stooping and bending and advised no lifting over 50 pounds. Claimant was examined at his attorney's request by Dr. Ernest R. Schlachter who also placed specific restrictions upon claimant, although different than those of Dr. Tezano. Dr. Schlachter opined claimant should be permanently limited from lifting more than 15 pounds on a repetitive basis with no single lifts of more than 25 pounds. Claimant was also restricted from repetitive bending, twisting and working in awkward positions. Dr. Schlachter opined claimant should have a job where he could sit part time and stand part time. Dr. Schlachter felt claimant had suffered a 30 percent whole body functional impairment.

Claimant was examined and evaluated by Mr. Jerry Hardin for the purpose of assessing claimant's work disability. Mr. Hardin, in reviewing the medical reports and restrictions of Dr. Schlachter, felt claimant had suffered a 40 to 45 percent loss of access to the open labor market. On cross-examination Mr. Hardin was provided the restrictions of Dr. Tezano and opined that, based upon these restrictions, claimant would have a 20 to 25 percent loss of access to the open labor market. Mr. Hardin felt claimant could earn \$200 per week under the restrictions placed upon him by Dr. Schlachter and \$300 per week under the restrictions placed upon him by Dr. Tezano. In evaluating claimant's earning abilities when compared to the stipulated \$659.32 average weekly wage, Mr. Hardin opined claimant would have a 69 percent loss of ability to earn comparable wages based upon the restrictions of Dr. Schlachter and a 54.5 percent loss of ability to earn comparable wages based upon the restrictions of Dr. Tezano.

In the Award the Administrative Law Judge found that 69 percent was the appropriate work disability to be granted to claimant based upon Mr. Hardin's opinion of claimant's loss of ability to earn comparable wages when considering the restrictions of Dr. Schlachter and when considering claimant's actual pre-injury average weekly wage. The Administrative Law Judge cites several cases from both the Kansas Supreme Court and the Kansas Court of Appeals as justification for his decision. In particular, he discusses the Supreme Court's analysis of work disability in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). In Hughes the Supreme Court found that in determining the extent of permanent partial general disability, both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. The Hughes Court did acknowledge that no specific formula was required so long as both factors were considered. Also cited in the Award is Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). Schad further solidified the requirement that a mathematical equation or formula must be utilized in arriving at the appropriate work disability. While it is noted that neither case requires a specific averaging of the numbers generated from the available evidence, both do indicate that consideration must be given to both loss of access to the open labor market and loss of ability to earn a comparable wage in order to reach a decision. The Administrative Law Judge, in evaluating the evidence, discussed the functional impairment of Dr. Tezano but failed in the Award to discuss the work disability opinions of Mr. Hardin based upon the limitations of Dr. Tezano. It is not clear from the Award whether the Administrative Law Judge properly considered the available evidence presented by Dr. Tezano as required when reviewing and considering the "whole record." See K.S.A. 44-501(a), as amended by S.B. 649 (1996). It is also noted that the Administrative Law Judge, in awarding claimant a 69 percent work disability based upon the claimant's loss of ability to earn comparable wages, provides no justification for same. The Court merely finds in the Award a disability of 69 percent and goes on to state: "The Court does not average the two prongs."

The Appeals Board acknowledges that the trier of facts must decide the accuracy and credibility of the testimony and to adjust the medical testimony along with the testimony of the claimant and other testimony that may be relevant to the question of disability. *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The trier of facts must consider all of the factors involved and compute the percentage of work disability accordingly. *Schad V. Hearthstone Nursing Center, supra*. While the Court is not required to explain its mental process in reaching a decision, nevertheless, justification for a work disability must be indicated.

In reviewing the evidence the Appeals Board finds, based upon the testimonies of Dr. Tejano, Dr. Schlachter and Mr. Hardin, that claimant has suffered a 33 percent loss of access to the open labor market. Considering the above testimonies, the Appeals Board further finds claimant has suffered a 61.75 percent loss of ability to earn comparable wages. In considering both factors as is mandated by K.S.A. 1991 Supp. 44-510e(a), the Appeals Board finds claimant has suffered a 47.5 percent permanent partial general body work disability as a result of the injury suffered while employed with respondent on August 22, 1991.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated January 25, 1995 should be, and is hereby, modified in that the claimant, Henry Hill, Jr., is awarded compensation against the respondent, Holstine Motors, Inc. and its insurance company, Equity Mutual Insurance Company, and the Kansas Workers Compensation Fund for an injury occurring August 22, 1991. Claimant is awarded 63 weeks temporary total disability compensation at the rate \$289 per week totaling \$18,207.00, followed by 352 weeks at the rate of \$208.80 per week totaling \$73,497.60 for a 47.5 % permanent partial general body work disability, in the sum of \$73,497.60 for a total award of \$91,704.60.

As of May 30, 1996, claimant would be entitled to 63 weeks temporary total disability compensation at the rate of \$289.00 per week, totaling \$18,207.00, followed by 186 weeks permanent partial general body disability at the rate of \$208.80 per week, totaling \$38,836.80, for a total of \$57,043.80 which is all due and owing in one lump sum, minus amounts previously paid. Thereafter, claimant is entitled to 166 weeks permanent partial general body disability at the rate of \$208.80 per week, totaling \$34,660.80 until fully paid or until further order of the Director.

Claimant is further entitled to authorized and unauthorized medical expenses per the Award of the Administrative Law Judge.

Future medical shall be awarded to claimant upon proper application to and approval by the Director.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 1991 Supp. 44-536.

The fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and the Workers Compensation Fund with the respondent being responsible for 40 percent and the Kansas Workers Compensation Fund being responsible for 60 percent to be paid as follows:

#### **OWENS, BRAKE & ASSOCIATES**

Preliminary Hearing Transcript Dated May 6, 1993	\$ 97.46
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Preliminary Hearing Transcript Dated June 9, 1993	\$452.70
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**HENRY HILL, JR.**

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**DOCKET NO. 168,059**

Motion Hearing Transcript \$ 130.01  
Dated November 4, 1993

TOTAL \$ 680.17

**DON K. SMITH & ASSOCIATES**

Deposition of Dr. Ernest Schlachter \$ 239.50  
Dated June 1, 1994

Deposition of Jerry Hardin \$ 300.00  
Dated June 21, 1994

Deposition of Charlene Hill \$ 159.50  
Dated July 25, 1994

TOTAL \$ 699.00

**LORI A. PRATER, C.S.R**

Transcript of Proceedings \$ 195.01  
Dated June 9, 1994

**BARBER & ASSOCIATES**

Deposition of Dr. Neonilo Tejano \$ 143.60  
Dated August 23, 1994

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Stephen J. Jones, Wichita, KS  
Andrew E. Busch, Wichita, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director